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EX PARTE OR LATE FILED

April 27, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Ex Parte Letter
WT Docket No. 97-82**

Dear Ms. Salas:

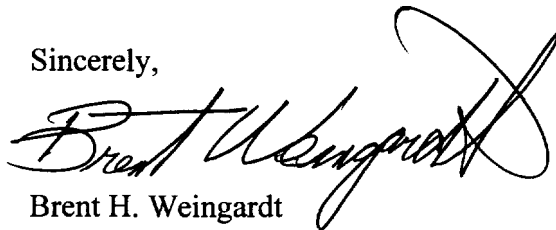
Personal
Communications
Industry
Association

The attached letter was sent earlier today to Mr. Bryan Tramont, Legal Advisor, Office of Commissioner Furchtgott-Roth, regarding the above-referenced proceeding.

The letter discusses some of the procedural issues that would likely be raised, and that the FCC would have to overcome, should the FCC ultimately decide to modify its eligibility rules for the C and F block PCS licenses and modify the PCS band plan without a rulemaking proceeding.

Pursuant to Section 1.1206 of the Commission's Rules, one original and one copy of this letter are being filed with your office. If you have any questions regarding this filing, please feel free to contact me at (703) 739-0300.

Sincerely,



Brent H. Weingardt
Vice President – Government Relations

Todd B. Lantor
Director -- Government Relations

Personal Communications Industry Association

Enclosure

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April 27, 2000

Mr. Bryan Tramont
Legal Advisor
Office of Commissioner Furchtgott-Roth
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Washington, DC 20554

**Re: Ex Parte Letter
WT Docket No. 97-82**

Personal
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Dear Mr. Tramont:

On April 17, 2000, PCIA filed comments with the Commission, in Docket No. 97-82, in opposition to the Joint Petition of US West Wireless and Sprint Spectrum ("Petitioners") for reconsideration of the *Order on Reconsideration of the Fourth Report and Order*. The Petitioners urge the Commission to amend several discrete DE rules adopted by the FCC more than five years ago. In its opposition, PCIA highlighted several procedural complications created by the Commission's apparent methodology for amending any PCS DE rules.

During our discussion last week, you requested that we identify the procedural issues that have been raised by PCIA and other commenters, and that the FCC would likely be faced with, in this matter. We hope that the information contained in this letter adequately addresses these procedural shortcomings and fulfills your request.

At the outset, PCIA wishes to reiterate its particular concern with the FCC's apparent decision to forgo a notice and comment rulemaking before amending its rules. PCIA does not believe that the Commission can substitute a late-filed petition for reconsideration for a timely notice and comment proceeding.

The Petitioners suggested in their petition that the Commission could rely upon the D.C. Circuit's decision in *Omnipoint v. FCC*, 78 F.3d 620, to avoid proper notice and comment. In fact, the *Omnipoint* court's decision was grounded upon a finding that the Commission had released a Further Notice of Proposed Rulemaking. *See Omnipoint v. FCC*, 78 F.3d 620, 629. The issue before the court was not the absence of a Further Notice of Proposed Rulemaking, but whether the Commission could institute expedited notice and comment deadlines when modifying PCS designated entity rules. The *Omnipoint* court found that the FCC was justified in releasing a FNPRM and requiring comment within 14 days

(and no reply comments) due to a combination of several factors including a congressional mandate to implement the C block auction without administrative or judicial delays and preservation of a viable market for C block licenses. *See Omnipoint v. FCC*, 78 F.3d 620, 629. These factors do not exist in the current situation.

The Administrative Procedure Act (APA) permits the FCC to forgo notice and comment in rulemakings only in exceptional circumstances. PCIA does not believe that "good cause," as established by the APA, exists here. *See* 47 U.S.C. 553(b)(3)(B). As the D.C. Circuit Court of Appeals recently found, "good cause" to dispense with notice and comment occurs only in emergency situations and should not be arbitrarily used at the agency's whim. *See Tennessee Gas Pipeline Company v. Federal Energy Regulatory Commission*, 969 F.2d 1141, 1143 (1992) *citing State of New Jersey v. EPA*, 620 F.2d 1038, 1045 (D.C. Cir. 1980) and *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). PCIA notes that even in the *Omnipoint* case, which involved a much more condensed timeframe and exceptional extrinsic factors, the Commission found it necessary to conduct a rulemaking.

Other parties have correctly notified the Commission that its apparent attempt to use a late-filed petition for reconsideration as a means of amending rules more than five years old cannot substitute for a current Commission proposal to change well-established rules. This is particularly true here since the Commission seems to be contemplating extensive amendments that would effect a significant change in the Commission's means of complying with Section 309(j)(3)(B) of the Communications Act. At best, Petitioners' pleading can be considered as a petition for rulemaking that might result in a FNPRM.¹ PCIA also notes that, just this week, Bell Atlantic decried the use of late-filed petitions for rulemaking as a means of changing rules adopted almost three years ago.²

Parties suggesting procedural infirmities, other than PCIA, include:

- Alpine PCS, Inc -- pp. 2, 4-8
- Burst Networks -- pp. 1-5
- Carolina PCS I Limited Partnership -- pp. 2-5

¹ In fact, in its recent comments, Sprint PCS noted that the FCC must proceed through a rulemaking if it is to change any of the PCS DE rules. *See* Sprint PCS Comments at 9 (Feb. 22, 2000) ("If the Commission believes that the DE eligibility rule merits reconsideration, it should commence a rulemaking proceeding to develop an adequate record to justify modification or elimination of the rule").

² *See* Bell Atlantic Opposition to AT&T Petition for Reconsideration on the Seventeenth Order on Reconsideration at 1, CC Docket No. 96-45 (Apr. 20, 2000) ("In knowing disregard of Federal law and Commission rules, AT&T seeks untimely reconsideration of a three year-old rulemaking order based on claims the Commission already properly rejected").

- Leap Wireless International, Inc. -- pp. 5-6
- Nextwave Personal Communications, Inc. -- pp. 4-5
- Northcoast Communications, LLC -- pp. 3-9
- TeleCorp PCS and Tritel Communications, Inc. -- p. 3, n.4.

Many of these commenters correctly noted the Commission's previous rejection of late-filed petitions for reconsideration as a substitute for proper notice and comment. In the 1998 *Time Warner Reconsideration Order*, the FCC rightly refused to grant Time Warner's petition for reconsideration of the *Fourth Report and Order* in the Open Video Systems ("OVS") proceeding. The FCC determined that the Time Warner petition requested modifications to OVS rules that were addressed in the *Second Report and Order* in the OVS proceeding, and not the *Fourth Report and Order*.³ Consequently, the Time Warner petition was really a late-filed petition for reconsideration of the OVS *Second Report and Order*, and the rule changes requested related "exclusively to matters wholly outside the scope of the *Fourth Report and Order*."

PCIA is concerned about procedural irregularities that transcend the strict requirements of the APA. To date, current and future PCS entrepreneurs have responded only to waivers and petitions of private parties. The Commission has yet to speak as to its willingness to change express DE rules, what those changes would be, and how designated entities would have an opportunity to meaningfully participate in upcoming PCS auctions.⁴

PCIA is also concerned that any compromise of established rulemaking procedures will result in further appeals, uncertainty, and needless delay in any upcoming C and F block re-auction. The FCC can minimize these undesirable consequences by initiating an expedited FNPRM in compliance with Section 553 of the APA.

PCIA strongly believes that the Commission should complete any remaining re-auctions under the current designated entity eligibility rules. Any changes to these rules that might reflect an acceptable compromise must be subjected to proper notice and comment procedures.

³ *Time Warner Reconsideration Order*, 13 FCC Rcd 14553, ¶¶ 13-15.

⁴ This last discussion is particularly important if the Commission intends to remove the C and F Block entrepreneur set aside that it has repeatedly found essential for their meaningful participation in these auctions.

Please feel free to contact the undersigned if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Brent Weingardt". The signature is fluid and cursive, with a large, stylized initial "B" and "W".

Brent H. Weingardt
Vice President -- Government Relations

Todd B. Lantor
Director -- Government Relations

Personal Communications Industry Association